

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

KENNETH CHARLES LASSITER and  
ALPHA DORIS D. LASSITER,

Plaintiffs,

v.

CITY OF BREMERTON, MATTHEW  
THURING, JOHN VANSANTFORD,  
ROBERT FORBES, BREMERTON POLICE  
CHIEF, et al.,

Defendants.

Case No. C05-5320RBL

ORDER ON DALTON DISCOVERY

This matter is before the court as the result of the Defendant Kitsap County's subpoena duces tecum to a non-party witness, Jeanette Dalton. Dalton is an attorney, and she represented Plaintiff Alpha Doris Lassiter in the underlying Municipal Court prosecution against her.

The Defendants' subpoena requested Dalton to produce documents and other evidence used in her representation of Mrs. Lassiter in state court. Dalton Objected to the Subpoena [Dkt. #96], citing the attorney/client and work product privileges, and claiming that any information which was not protected was more readily available from other sources, including the Defendant City of Bremerton. The Defendants have moved to Strike the Objection [Dkt. #100] and the Plaintiffs moved to Quash the Subpoena [Dkt. # 102]. Defendants also seek to strike portions of the Plaintiffs' Opposition to the Motion to Strike [Dkt. #129].

The facts of the underlying case are well known to the parties. Generally, a neighbor called 911 after

1 hearing a dispute between Mr. and Mr. Lassiter in their home. The police arrived and entered the home. They  
2 eventually arrested Mr. Lassiter and he was charged with obstruction of justice. He had, without the officers'  
3 knowledge, tape recorded the portion of the incident in which the officers were in his home. Mrs. Lassiter  
4 testified that she spent hours transcribing the tape, by playing, stopping, and rewinding the tape "hundreds of  
5 times." In doing so, she apparently altered (or erased) some portion of the tape. Because the tape  
6 contradicted the officers' account of the arrest, the obstruction of justice charge was dismissed. The Lassiters  
7 filed this action, seeking among other things 42 U.S.C. §1983 damages for violation of their rights under the  
8 Fourth, Fifth, and Fourteenth Amendments and associated state law claims. Shortly thereafter, additional  
9 criminal charges were filed against Mr. and Mrs. Lassiter. Those charges were dismissed.

10 At issue here is Kitsap County's effort to obtain from Mrs. Lassiter's attorney information about the  
11 tape and the transcript created by Mrs. Lassiter. Plaintiffs claim that the information sought is privileged, and  
12 that the privilege has not been waived. They claim specifically that the "transcript" sought by the defendants  
13 from Dalton is nothing of the sort; instead, they claim it is merely a "subjective narrative of the events" created  
14 by Mrs. Lassiter for her attorney. Defendants contend that this is a new, inconsistent position. They seek to  
15 strike from the Plaintiffs' opposition those references in which it is claimed that the transcript of the events at  
16 the heart of this case was only "a narrative" created for counsel, as that claim is diametrically opposed to claims  
17 Mrs. Lassiter has previously made about when, how and why she transcribed the surreptitious recording made  
18 by her husband.

19 **1. The "Transcript."**

20 As an initial matter, the court will not strike allegations and argument from the record based on the  
21 contention (or even the proof) that it is contrary to a prior position. There is no purpose in doing so; the  
22 parties may make of any alleged discrepancies what they will.

23 Secondly, it is clear that Mrs. Lassiter's current position (or rather that of her counsel; no evidence  
24 supports the claim that the "narrative" was subjective or was prepared for counsel) is flatly inconsistent with  
25 her prior position that she sought to make an accurate transcription of the tape. [See Dkt. #130 at Ex. A, page  
26 2]. The parties agree that the tape was either mistakenly or intentionally altered. The transcript obviously is  
27 not a communication to counsel – it is instead, in Mrs. Lassiter's words, her best effort to accurately transcribe  
28 the tape her husband made of his arrest. Nor are any versions of the transcript work product – there is no

1 evidence that the transcript was prepared in anticipation of litigation or for any particular attorney.

2 Finally, even if the transcript could be characterized as work product, the admitted “anomaly” renders  
3 the early versions of the transcript the only possible source for determining what the tape showed before it was  
4 altered. The Transcript(s) would therefore be discoverable despite the privilege, based on substantial need.

5 For these reasons, all versions of the transcript prepared by Mrs. Lassiter are discoverable – whether  
6 they are in her possession, or in the possession of her former or current attorney. The Court will not strike  
7 the portion of the subject subpoena duces tecum which seeks this information, and Ms. Dalton will provide  
8 all versions in her possession in response to the subpoena duces tecum.

9 **2. Waiver of the attorney client privilege.**

10 The court agrees that the subject subpoena is broad enough to encompass communications and other  
11 documents protected by the attorney/client and or work product privileges. Defendants argue that the  
12 attorney/client privilege was waived when the Lassiters named Ms. Dalton as a potential witness in the case.  
13 Plaintiffs assert that they did so so that she could testify about her conversations with prosecutors, not to  
14 “place at issue” the conversations and communications she shared with her client.

15 Under these circumstances, and assuming that such conversations are not subsequently “placed at  
16 issue,” the attorney client privilege has not been waived. Nor is it waived by Dalton’s failure to provide a  
17 privilege log – as the Plaintiffs correctly point out, the privilege is not Dalton’s to waive, either affirmatively  
18 or by omission. The court will not at this time order Dalton to produce a privilege log of the other  
19 communications and documents in her possession related to her representation of Mrs. Lassiter – it is clear that  
20 the bulk of those are privileged and that that privilege has not been waived.

21 Under Fed. R. Civ. P. 45(c)(3)(A)(iii), the court will MODIFY Kitsap County’s subpoena duces tecum  
22 to Ms. Dalton so that it seeks and obtains only “all versions of Mrs. (or Mr.) Lassiter’s transcription of the  
23 audio tape made by Mr. Lassiter.”

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1 Ms. Dalton's Objections [Dkt. #96] to the subpoena are DENIED to this extent; the remainder of her  
2 objections are upheld. Similarly, the Motion to Strike the Objections [Dkt. #100] is DENIED (except as herein  
3 explained) and the Motion to Quash [Dkt. #102] is GRANTED, with the exception of the transcripts, as noted  
4 above.

5 DATED this 13<sup>th</sup> day of July, 2006

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7 RONALD B. LEIGHTON  
8 UNITED STATES DISTRICT JUDGE  
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